

A **TAN HOCK LENG v. RHB BANK BHD**
HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[CIVIL SUIT NO: 22NCVC-79-05-2015]
3 AUGUST 2016

B ***BANKING:*** Banker and customer – Duty of care – Breach of duty – Duty as reasonably skilled banker – Responsibility for ensuring accurate information reported to Bank Negara Malaysia – Automated reporting of customer’s account as ‘Account Under Special Attention’ due to system error – Whether bank breached duty of care
C – Whether bank could rely on exemption clause to negate liability

TORT: Negligence – Duty of care – Banker and customer – Duty as reasonably skilled banker – Responsibility for ensuring accurate information reported to Bank Negara Malaysia – Breach of duty – Automated reporting of customer’s account as ‘Account Under Special Attention’ due to system error – Whether bank breached
D duty of care – Whether bank could rely on exemption clause to negate liability

TORT: Defamation – Libel – Banking – Automated reporting of customer’s account as ‘Account Under Special Attention’ in report to Bank Negara Malaysia – Whether defamatory of customer – Whether information in report available
E automatically – Whether third party banks had seen report – Whether publication proven

The plaintiff, a customer of the defendant bank, brought an action against the latter for breach of duty of care as a banker and libel. The plaintiff’s cause of action was based upon failure to auto-debit his personal financing account
F for a certain period of time. This triggered a chain of events that eventually culminated in the plaintiff’s account being classified as ‘Account Under Special Attention’ in the central credit reference information system (‘CCRIS’) report of Bank Negara Malaysia (‘BNM’). The defendant, on the other hand, contended that this was due to a ‘system failure’ which was
G beyond their control and therefore was not liable. The defendant further contended that the information regarding the plaintiff’s account was not defamatory and even if the wordings were defamatory, they were entitled to rely on the defence of qualified privilege and inadvertent libel. The defendant also contended that the plaintiff had failed to establish any loss or damage ensuing as a result.

H **Held (dismissing plaintiff’s claim with costs):**

(1) There existed a duty of care on the part of the defendant towards the plaintiff which was the duty to take such care as a reasonably skilled banker would. The banks, its servants and/or agents and/or its
I independent contractors responsible for the maintenance of the banks computerised system were responsible for ensuring that accurate information was reported to BNM. The cause of the automated reporting

- of the plaintiff's PF account as 'Account Under Special Attention' was due to a system error. The defendant had therefore breached their duty of care as banker to the plaintiff as they ought, as responsible and skilled bankers, to have ensured that their computerised systems were safe or to have minimised the risk of such occurrence and to have taken such care as to avoid the erroneous reporting of the plaintiff's financial status to BNM (paras 53, 57, 67 & 70) A
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- (2) Authoritatively, there is no rule of law that states that whenever there is a fundamental breach or a breach of a fundamental term, the party in breach of the contract cannot rely on the exemption clause. It is always a rule of construction as to whether the exemption clause is drafted wide enough to cover the said breach. Clause 5.13 of the 'RHB Personal Financing (Conventional) Terms and Conditions' stated that the defendant shall not be liable for any failure to carry out its obligations resulting from, amongst others, a breakdown of machinery or computer system or any other matter beyond the control of the bank. Therefore, it was clear that such situation as that having occurred was envisaged and contemplated and there could be no doubt that the defendant was seeking to exclude such situation. The wordings were widely drafted and had rendered effective the reliance of the defendant upon the said clause against the plaintiff. (paras 72, 77, 79 & 80) C
D
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- (3) The defendant had proven that the term and condition was brought to the attention of the plaintiff when he signed the application form for the facility and the plaintiff was bound by the term and condition. The defendant's successful reliance on cl. 5.13 had therefore operated to negative the defendant's liability and therefore, the claim of the plaintiff failed. (paras 81 & 88) F
- (4) There was insufficient information contained in the particulars in the 'Account Under Special Attention' to be construed as defamatory or libellous of the plaintiff. There are other sources than the CCRIS report from which the banking or financial institutions may refer to in order to obtain credit information on the plaintiff. Further, the information contained in the CCRIS report is not conclusive when considering the financial status of a potential borrower as the report contains both positive and negative information about the borrower and does not blacklist any borrower. (paras 93, 96-98 & 100) G
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- (5) In respect of the element of publication, the information contained in the CCRIS report was not available automatically but only upon request. There was no evidence that any bank or financial institutions had made any requests for the CCRIS report. Further, the plaintiff had agreed that the four CCRIS reports tendered as exhibits were reports applied for by himself and not by any third party. There was also no evidence that any third party bank or financial institution had seen the CCRIS report of the plaintiff whilst his PF account was marked as 'Account Under Special I

- A Attention'. Hence, the plaintiff had failed to prove publication to a third party. Consequently, the plaintiff's claim for defamation failed. (paras 105 & 107)

Case(s) referred to:

- Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd* [1983] 1 All ER 101 (*refd*)
- B *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 CA (*refd*)
- Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC (*refd*)
- Canada Steamship Lines Ltd v. Regem* [1952] 1 All ER 305 (*refd*)
- Dannabar Ragavan v. AmBank Bhd* [2012] 1 LNS 1199 HC (*dist*)
- C *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd* [1982] 1 All ER 108 (*refd*)
- Hong Realty (Pte) Ltd v. Chua Keng Mong* [1994] 3 SLR 819 (*refd*)
- Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827 (*refd*)
- Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (*refd*)
- D *Wong Kee Seong v. Hong Leong Bank Bhd* [2013] 1 LNS 255 HC (*foli*)
- For the plaintiff - Tan Hong Jin & Loo Shin Yee; M/s Aswar, Simon & Azhar*
For the defendant - Selvan Jayaraj Samuel; M/s Tay Ibrahim & Partners
- Reported by S Barathi*

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JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

- F [1] The plaintiff, a customer of the defendant bank, brought an action against the latter for defamation and breach of banker's duty. The plaintiff's cause of action was based upon a failure to auto-debit his personal financing account for a certain period of time. This triggered a chain of events that eventually culminated in the plaintiff's said account being classified as a "Special Attention" account in the Central Credit Reference Information
- G System (CCRIS) report dated 14 November 2014 of Bank Negara Malaysia.

- [2] The defendant, on the other hand contended that this was due to a "system failure" which was beyond their control. They were therefore not liable and further contended that the said information regarding the plaintiff's account was not defamatory and in any event there was no publication.

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Preliminaries

- [3] The cause papers and documents at the trial were marked as follows:
- (a) Bundle of Pleading – encl. A;
- I (b) Common Agreed Bundle of Document (CABD) (Part B&C) – encl. B;
- (c) Ikatan Dokumen Tambahan Defendan – encl. D;
- (d) Ikatan Dokumen Plaintiff – encl. F.

[4] The following witnesses who testified and their respective witness statements were as follows: A

The plaintiff's witness:

(a) Tan Hock Leng (SP1) – witness statement: WSP1

The defendant's witnesses: B

(b) Loo Saw Hoon (SD1) – witness statement: WSD1 & WSD1A

(c) Syed Hazman bin Syed Abu Hassan (SD-2) – witness statement: WSD2

Salient Facts

[5] The facts giving rise to the claim as disclosed in the pleadings and unravelled during the course of the trial by both the plaintiff and the defendant's witnesses as well as party's respective contentions are set out in summary herein below. C

[6] The plaintiff is a customer of the defendant bank. On or about 30 March 2011, the plaintiff opened a savings account no. 10701900694137 with the defendant's branch. On or about 13 February 2012, the plaintiff applied for and obtained a ("personal financing") under account no. 71412900475426 for the amount of RM51,000 from the defendant where the plaintiff was required to make monthly instalments of RM1,295.06 for a duration of 60 months. D E

[7] The plaintiff gave instructions to the defendant that he intended to make repayment by way of "auto-debit" by monthly deductions for the personal financing account from his savings account. The auto-debit transaction was only carried out for several months. F

[8] From May 2013, the auto-debit transaction failed notwithstanding that the plaintiff's savings account had sufficient funds. Since May 2013, the plaintiff attempted to make payment for the personal financing account over the counter because of the failure of the auto-debit transaction but was unsuccessful as the said account had been automatically "written-off" due to the arrears. This situation lasted until April 2014. G

[9] The plaintiff was made to understand by the defendant that the auto-debit transaction could not be done because the plaintiff's personal financing account had vanished from the defendant's system. H

[10] Thereafter, the defendant carried out six (6), five (5) and one (1) auto-debit transactions on the 10 April 2014, 11 April 2014 and 14 April 2014 respectively. The defendant created a new personal repayment account no. 71412900660789 ("the second account") to replace the plaintiff's personal financing account. I

- A [11] This resulted in the plaintiff's personal financing account being treated as non-payment which in turn had automatically triggered the Central Credit Reference Information System (CCRIS) report dated 14 November 2014 which showed the plaintiff's personal financing account being classified under "special attention".
- B [12] This unsatisfactory situation, contended the plaintiff, was caused by the negligence of the defendant which had resulted in the plaintiff's inability to obtain loans elsewhere and had also resulted in a libel against the plaintiff.
- C [13] The defendant's case is that the auto-debit transactions ceased to operate due to a "system error" which occurred and did not result from a want of care on their part. This system error was beyond the control of the defendant and they are therefore not liable.
- D [14] The defendant also places reliance upon cl. 5.13 of the "RHB Personal Financing (Conventional) Terms and Conditions" which excludes the defendant for being liable for any failure to carry out its obligations to the plaintiff due *inter alia* to "breakdown of machinery or computer system" or to "any other matter beyond the control of the bank". In addition, the defendant also relies on other terms and conditions in the plaintiff's application form, Customer Confirmation Document and the "RHB Personal Financing (Conventional) Terms and Conditions".
- E [15] The defendant also stated that they had taken all necessary steps to reinstate or restore the plaintiff's personal financing account no. 71412900475426 including manually debiting the plaintiff's savings account with 12 instalment payments towards the payment of the arrears in the plaintiff's personal financing account sometime in April 2014.
- F [16] The failure of the auto-debit system resulted in the plaintiff's personal financing account being treated as non-payment and this in turn had automatically triggered the CCRIS report dated 14 November 2014 which showed the plaintiff's personal financing account being classified under "special attention".
- G [17] As such the events that led to the plaintiff's account being classified as under "special attention" was unintentional. Upon being notified of this, the defendant took the following remedial steps to rectify the situation:
- H (a) Issuing a letter dated 23 December 2014 to the plaintiff to officially confirm that the plaintiff's personal financing account was satisfactory;
- (b) Creating a new account (no. 71412900658890) to enable the plaintiff to continue repayment of the plaintiff's personal financing account;
- I (c) Rectifying the CCRIS report dated 30 April 2014 in respect of the plaintiff's personal financing account sometime in January 2015;
- (d) Creating a second new account (no. 71412900660789) to replace the plaintiff's personal financing account as the plaintiff had rejected the first new account.

[18] The defendant therefore pleaded that there was no breach of duty as banker as they had carried out their duties with reasonable care and skill. They also pleaded that the tagging of the plaintiff's personal financing account as being under "special attention" on 30 April 2014 was automatically triggered through no fault of their own and neither was there any improper motive or malice on the part of the defendant.

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[19] The defendant further pleaded that the CCRIS report dated 30 April 2014 when taken as a whole was not defamatory of the plaintiff and that they were protected by the defence of qualified privilege. In the alternative, they also pleaded that it was an inadvertent libel. Finally, the defendant pleaded that they had taken all necessary steps to mitigate and/or to obliterate any damages suffered if at all, by the plaintiff who they contended was actuated by an improper motive.

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Issues For Consideration

[20] From the factual matrix of the case, the broad issues that fell for the determination of the court could be summarised as follows:

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- (a) Whether the defendant owed a duty of care ("duty of banker") to the plaintiff;
- (b) If so, whether the defendant had breached the duty of care by negligence, failure, and/or refusal to carry out the auto-debit transaction since May 2013 even though the plaintiff's savings account had at all material times sufficient funds to perform the said auto-debit transaction;
- (c) Whether the failure of the auto-debit transaction since May 2013 was due to a system error;
- (d) If the defendant is liable for breach of its duty of care, was there anything that operated to negative the defendant's liability;
- (e) If the defendant is liable for breach of duty, whether the defendant is protected by the defence of ("mitigation/obliteration of damages");
- (f) If the defendant is liable for breach of duty, whether the plaintiff is entitled to general damages and "aggravated damages";
- (g) Whether the defendant had wrongfully, without care and/or negligently reported or had caused to be reported to Bank Negara Malaysia that the plaintiff's personal financing account was under "special attention" and whether the publication in CCRIS through the online system had constituted a libel against the plaintiff; and
- (h) If so, whether the defendant is protected by the defence of qualified privilege.

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A Submission Of Parties*The Plaintiff*

B [21] The plaintiff submitted that the defendant, agents and/or employees of the defendant had on 30 April 2014 recklessly, wrongfully and/or negligently reported or caused to be reported to Bank Negara that the personal financing account of the plaintiff is a special attention account.

C [22] The plaintiff submitted that the special attention account was triggered in the plaintiff's CCRIS report when the defendant made 12 months deduction in April 2014. The said special attention account appeared as follows:

Akaun Di Bawah Pemerhatian Khas

D	No	Tarikh kelulusan	Status	Kapasiti Pinjaman	Pemberi	Cawangan	Kemudahan	Nombor Akaun/Permohonan	Jumlah Tarikh Baki kemas Belum kini Jelas
	12	13/02 / 2012		Sendiri	RHB BANK	14129	Pembiayaan /Pinjaman Peribadi	71412900 75426	30/04 /2014

E [23] The plaintiff submitted that the words abovestated had the tendency to lower the plaintiff in the estimation of right thinking members of society and were therefore defamatory.

F [24] The plaintiff submitted that it was clear in evidence that the defendant was one of the financial institutions participating in CCRIS. The defendant had also admitted that they could have done something in order to rectify, 'untag' or remove the special attention account from the CCRIS as the defendant is requested to update CCRIS account and report the credit related information to Bank Negara's credit bureau.

G [25] It was further submitted that the defendant who were one of the participating financial institutions, were required to report to the Bank Negara Malaysia's credit bureau regarding the credit information of the plaintiff as a borrower including the profile of the plaintiff, credit application details, and credit account details such as conduct of the account of the plaintiff.

H [26] The credit bureau's role were only to collect credit related information on borrowers from all participating financial institutions including the defendant and to furnish the credit information collected back in the form of a credit report, which was made available to all participating financial institutions.

I [27] The plaintiff had also submitted that the CCRIS report is also used by the participating financial institutions in assessing a credit application and/or assess the credit worthiness of existing borrowers.

[28] The plaintiff submitted therefore that the creation of the special attention account in CCRIS would lead any reasonable reader to be suspicious of the creditworthiness of the plaintiff and that further enquiry will have to be made before providing the plaintiff any loan or credit.

A

[29] It would suggest therefore the following:

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- (i) the plaintiff has failed in the repaying of loans to the defendant;
- (ii) the plaintiff is not creditworthy;
- (iii) the plaintiff has financial problems and unreliable;
- (iv) the plaintiff is not entitled to apply for any loan;
- (v) the plaintiff is dishonest because he had breached his contract with the defendant;
- (vi) the plaintiff is borrower with poor credit; and
- (vii) the plaintiff frequently fails to repay his loans.

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D

[30] The plaintiff submitted that the special attention account has been caused to be printed and published in plaintiff's CCRIS through the online system by the defendant who was one of the financial institutions participating in CCRIS.

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[31] It was submitted that the CCRIS online system could be accessed by all participating financial institutions and there are more than 27 financial institutions that participate in CCRIS. The plaintiff's personal financing account had been listed as a special attention account in CCRIS for eight months since 30 April 2014.

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[32] The plaintiff submitted that it had applied for a loan from Alliance Islamic Bank and the application was rejected where the bank officer had informed the plaintiff that his CCRIS 'has a problem' and this was the reason why the plaintiff had made a CCRIS search on 14 November 2014. The plaintiff had lodged a police report against the defendant's misconduct on 15 November 2014 and later lodged a complaint with Bank Negara. The defendant also agreed that it was part of the system that the lending bank will do a CCRIS search on the credit information of the applicant/borrower when there is an application of a loan.

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[33] It was submitted that all the elements of defamation had been established. Therefore, the defendant was liable for defamation in libel. The defendant was also in breach of its banker's duty of care.

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The Defendant

[34] The defendant submitted that the failure of auto-debit system was solely due to the occurrence of a "system error" which was beyond the control of the defendant.

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A [35] The defendant also submitted that the said “system error” or
“computer breakdown” had caused a chain reaction leading ultimately to the
labelling of the plaintiff’s personal financing account (PF) as “Account Under
Special Attention”. The effect of the “system error” as a result of the
plaintiff’s PF account falling into arrears for a few months was that the said
B PF account was automatically written-off by the system and this explained
why the plaintiff was not able to make manual repayments of his monthly
instalments over the counter.

[36] The writing-off process of the plaintiff’s PF account is automated and
its occurrence also triggered the automated reporting of the plaintiff’s PF
C Account as “account under special attention” in the CCRIS report.

[37] The defendant submits that they are excluded from liability for any
failure to carry out its obligations as a banker to the plaintiff resulting from
the occurrence of the “system error” pursuant to cl. 5.13 of the terms and
conditions which is binding on the plaintiff.

D [38] The defendant said that cl. 5.13 of the terms and conditions state that
the defendant shall not be liable for any failure to carry out its obligations
resulting from amongst others, a breakdown of machinery or computer
system or any other matter beyond the control of the bank.

E [39] The defendant submitted further that cl. 5.1.2 of the terms and
conditions entitled the defendant to

- (a) combine or consolidate all or any of the plaintiff’s accounts; and/or
- (b) to set-off or transfer any sum standing in the credit in any one or more
F of the plaintiff’s accounts in or towards satisfaction of the indebtedness
or any part thereof.

[40] The above clause also gives the defendant the right to make manual
deductions from the plaintiff’s savings account towards settlement of the
arrears in the plaintiff’s PF account in April 2014. It also gave the defendant
G the right to create the first new account (no. 71412900658890) which was
rejected by the plaintiff, to replace the PF account.

[41] Further, it also gave the defendant the right to create the second new
account (no. 71412900475426) to replace the plaintiff’s PF account
and therefore the plaintiff’s rejection of the second new account
H (no. 71412900660789) as replacement of his PF Account had no basis.

[42] The defendant only discovered that the plaintiff’s PF account was
tagged as “account under special attention” upon being informed by BNM
on 12 December 2014 and the defendant could not have known earlier that
plaintiff’s PF account was tagged as an “account under special attention”
I because the said PF account was already regularised or restored in April
2014.

- [43] The defendant said that they also took expeditious steps to rectify the status of the “account under special attention” tag from the plaintiff’s PF account within one (1) month by doing the following: A
- (a) Issuing a letter dated 23 December 2014 to the plaintiff confirming that the plaintiff’s payment conduct for the PF account was satisfactory; B
 - (b) Creating a new account (no. 71412900658890) to replace the plaintiff’s PF account, the terms of which were rejected by the plaintiff; and
 - (c) Creating a second new account (no. 714129006607789) to replace the plaintiff’s PF account which still exists until today.
- [44] The “account under special attention” tag on the plaintiff’s PF account was removed in January 2015. C
- [45] The defendant contended that there was no evidence led that during the period when the plaintiff’s PF account was categorised as “account under special attention”, the plaintiff had applied for or submitted applications for new loans to any financial or banking institutions and that these applications had been processed and/or rejected by these banks. D
- [46] The defendant contended that the CCRIS report was merely a credit report on borrowers/potential borrowers and did not blacklist them and that as adduced in evidence there are several other factors and other sources of information that influence the manner in which financial institutions assess the creditworthiness of a potential borrower. E
- [47] The defendant submitted that even if the defendant was to be held negligent in carrying out its duty as a banker to the plaintiff (which is denied) the defendant has not proven his alleged loss. F
- [48] In relation to the allegation that the contents of the CCRIS report with Bank Negara was defamatory, the defendant submitted that taken as a whole the said contents are not defamatory in nature. It was submitted that the fact that the space under the heading “status” was left blank while the space under the heading “balance outstanding amount” was also left blank, showed that there was not enough information for anyone to conclude that the plaintiff had defaulted on his loan and consequently that he was a financial risk and not creditworthy. G
- [49] There was also no evidence tendered in court to show that a third party (bank or financial institution) had actually seen the CCRIS report of the plaintiff whilst his PF account was marked as “account under special attention”. Publication had thus not been proven. H
- [50] The defendant submitted that even if the said words were defamatory, they were protected by qualified privilege. They also submitted that they were entitled to rely upon the defence of inadvertent libel. I

A Analysis, Findings And Decision

[51] To summarise from the factual matrix of the instant case referred to above, the plaintiff brought a cause of action against the defendant for breach of duty of care (“duty of banker”) and for defamatory libel. The defendant contended that they had not breached the said duty of care even if any arose, which they denied, and that the said wordings alleged to be defamatory were in fact not defamatory. Even if the said wordings were defamatory, they were entitled to rely on the defence of qualified privilege and inadvertent libel. They also contended that the plaintiff had failed to establish any loss or damage ensuing as a result.

C Duty Of Care In Negligence (“Duty Of Banker”)

[52] In *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585, it was held:

To make out a case against a defendant in the tort of negligence, a plaintiff must establish four ingredients. First, he must show that he owed a duty by the defendant to take reasonable care. Second, that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth that he (the plaintiff) suffered damage that is not too remote. There is a tendency on the part of some textbook writers (in the interest of tidiness) to treat each of these elements in watertight compartments. Such an approach may be quite misleading. This is because what a court trying an action for negligence is concerned with is the interpretation of a particular set of facts as establishing or negating one or more of the ingredients of the tort.

[53] I do not think that there can be much argument about the fact that there existed a duty of care on the part of the defendant toward the plaintiff. It is the duty to take such care as a reasonably skilled banker would. The issue for determination therefore is whether under all the circumstances, the defendant had breached such duty and if so, whether any losses or damages that were not too remote had ensued as a result.

[54] The genesis of the problem that triggered the chain of events that eventually led to the categorisation of the plaintiff’s personal financing (PF) account as “account under special attention” was due to a breakdown in the defendant’s computer system referred to as a “system error”.

[55] Evidence was led that such a “system error” was not something that could have been detected by the defendant at the material time. The effect of the “system error” as a result of the plaintiff’s PF account falling into arrears for a few months was that the said PF account was automatically written-off by the system and this explained why the plaintiff was not able to make manual repayments of his monthly instalments over the counter.

[56] The writing-off process of the plaintiff’s PF account is automated and its occurrence also triggered the automated reporting of the plaintiff’s PF account as “account under special attention” in the Central Credit Reference Information System (CCRIS) report to Bank Negara.

[57] Evidence was led as to this by the defendant's witness, Loo Saw Hoon (SD1) that this was a peculiar situation which was not previously encountered. The cause of the automated reporting of the plaintiff's PF account as "account under special attention" in the CCRIS report to Bank Negara was therefore due to a system error.

[58] SD1 further explained during examination-in-chief as follows:

When we did the manual deductions, the auto-debit system was reinstated, which means that the Plaintiff's PF Account had been regularised. It showed as though the matter had already been resolved. However, in December 2014, we were surprised when Bank Negara Malaysia informed the Defendant that the Plaintiff's PF Account was actually tagged under "Special Attention".

[59] From the evidence of SD1, it is evident that normally, the 12 months instalments (manual) payment into the plaintiff's PF account would have regularised or restored the plaintiff's PF account. To the contrary, in this case, the plaintiff's PF Account was subsequently tagged as under special attention. This submitted the defendant, points to a system failure beyond the control of the defendant.

[60] SD1 testified that the defendant only discovered that the plaintiff's PF account was tagged as "account under special attention" upon being informed by Bank Negara Malaysia (BNM) on 12 December 2014. SD1 also testified that the defendant could not have known earlier that the plaintiff's PF account was tagged as an "account under special attention" because the said PF account was already regularised and/or restored in April 2014.

[61] DW1 also explained the steps the defendant would have taken had the system alerted the defendant in respect of the "default in repayment", of the instalments during the first, second month and/or third month. It can also be reasonably and safely assumed that had the defendant been alerted to the "default in repayment", they would not have hesitated to have sought recourse for recovery at an accelerated and urgent pace.

[62] They could not therefore under the circumstances take any remedial steps to immediately rectify the position. However, upon discovering that the plaintiff's PF account was categorised as "account under special attention" in the CCRIS report to Bank Negara, they took immediate remedial steps to rectify the position by doing the following:

- (a) issuing a letter dated 23 December 2014 to the plaintiff confirming that the plaintiff's payment conduct for the PF account was satisfactory;
- (b) creating a new account (no. 71412900658890) to replace the plaintiff's PF account;
- (c) creating a second new account (no. 714129006607789) to replace the plaintiff's PF account.

A [63] The examination-in-chief of SD1 reveals the steps the defendant took to rectify the plaintiff's PF account as follows:

Q. So what was done to enable the Plaintiff to continue repayment of his PF Account?

B A. A new PF Account had to be opened ... this was the only way to enable the Plaintiff to resume payment of the balance sum under his PF Account.

[64] During cross-examination DW1 testified as follows:

C It was rectified meaning we closed the old Account and opened a new Account.

We closed the old Account so we uplifted the tagging.

D [65] It is evident that from the evidence of DW1 above, the only way that the "special attention" tag could be removed from the plaintiff's PF account was by substituting it with a new PF account which the defendant had done. The defendant therefore took reasonable steps to rectify the situation.

E [66] The system error in the instant case was on the evidence beyond the control of the defendant and beyond their knowledge at the material time. There was no evidence to suggest that any amount of human intervention or foresight on their part could have averted the problem.

F [67] Notwithstanding, although it was the system error that triggered the chain of events that led to the plaintiff's PF account being classified as "special attention", the bank cannot lay the blame for the situation that occurred at the feet of anyone else other than themselves. The bank, its servants and/or agents and/or its independent contractors responsible for the maintenance of the banks computerised system, are responsible for ensuring that accurate information was reported to Bank Negara Malaysia.

G [68] The banking industry occupies by its very nature, a pivotal role in the nation's economy. Hundreds if not thousands of customers place their money and in so doing their trust in banking institutions. In this age of advanced technology, when banking has been transformed so that at the mere click of a button, large sums of funds can be transferred in an instant without leaving the creature comforts of the home, it is anathema and almost sacrilegious to even think of such an error having occurred as happened here or at least minimised the risk of such an occurrence.

H [69] Banks like almost all other institutions today have their information technology (IT) experts. They are persons who are highly skilled and trained and ought to have ensured and guarded or minimised against such system failures occurring.

I [70] Upon all the circumstances of the case therefore, I find that the defendant had breached their duty of care as banker to the plaintiff as they ought as responsible and skilled bankers to have ensured that their

computerised systems were fail safe or to have minimised the risk of such occurrence and to have taken such care as to avoid the erroneous reporting of the plaintiff's financial status to Bank Negara.

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[71] The issue that now arises is whether there was there anything that operated to negative the defendant's liability.

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[72] Clause 5.13 of the "RHB Personal Financing (Conventional) Terms and Conditions" state that the defendant shall not be liable for any failure to carry out its obligations resulting from amongst others, a breakdown of machinery or computer system or any other matter beyond the control of the bank. It is clear therefore that such a situation as that having occurred was envisaged and contemplated.

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[73] The said cl. 5.13 as contained in the "RHB Personal Financing (Conventional) Terms and Conditions" were contained in pp. 5 to 8 marked as "D-38" in Bundle of Documents marked "D".

[74] DW1 had also testified that the plaintiff was given a copy of the said terms and conditions and that it was further alluded to in the customer confirmation document (exhs. D-36 and D-37). I therefore find that on the evidence, "D38" was received by the plaintiff.

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[75] The Privy Council case of *Canada Steamship Lines Ltd v. Regem* [1952] 1 All ER 305, in considering whether a clause purporting to exempt a party to a contract from liability for negligence held as follows:

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Their Lordships think that the duty of a court approaching the consideration of such clauses may be summarised as follows: (i) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be give to that provision. Any doubts which existed as to whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *Glengoil SS Co v. Pilkington*. (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with art 1019 of the Civil Code of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation." (iii) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence" to quote again Lord Greene MR in the *Alderslade* case. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but, subject to this qualification, which is, no doubt, to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, *prima facie*, wide enough to cover negligence on the part of his servants.

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- A [76] This decision was followed in the Singapore case of *Hong Realty (Pte) Ltd v. Chua Keng Mong* [1994] 3 SLR 819 which held:

Exemption clauses must be construed strictly to apply to the particular circumstances the parties had in mind at the time they entered into the contract.

- B [77] It is thus clear that clear words must be used in order to render effective such clauses that purport to exempt a party from negligence. Upon a plain consideration of the wordings employed, there can be no doubt that the bank was seeking to exclude situations involving a breakdown of machinery or computer system or any other matter beyond the control of the bank.

- C [78] The fact that *Hong Realty* was a case in bailment made no difference to the general applicability of the principle it espoused. Although the plaintiff had in fact relied upon *Hong Realty*, I find that the principle enunciated actually favours the defendant here.

- D [79] The trilogy of cases emanating from the House of Lords of *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827, *Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd* [1983] 1 All ER 101, and *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd* [1983] 1 All ER 108, stated authoritatively that there is no rule of law that states that whenever there is a fundamental breach or a breach of a fundamental term, the party in breach of the contract cannot rely on the exemption clause. To the contrary, it was held that it is always a rule of construction as to whether the exemption clause is drafted wide enough to cover the said breach. In so holding, the position stated in *Suisse Atlantique Societe' d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 was reinforced.

- E [80] Therefore although evidence was given that the situation which occurred was a peculiar one which had not happened before, the wordings in the said cl. 5.13 evidenced that the situation provided for had been envisaged and anticipated by the defendant. The wordings employed in the said clause were also widely drafted enough to encompass the situation and the eventuality envisaged namely, "a breakdown of machinery or computer system or any other matter beyond the control of the bank". The wordings employed therefore had rendered effective the reliance of the defendant upon the said clause against the plaintiff.

- H [81] From a consideration of all the evidence, the defendant had sufficiently proven that such a term and condition was brought to the attention of the plaintiff when he signed the application form for the facility. I hold therefore that the plaintiff was bound by the said term and condition. The defendant's successful reliance on the said cl. 5.13 had therefore operated to negative the defendant's liability under the circumstances.

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[82] I also tend to agree with the defendant's reliance on the case of *Wong Kee Seong v. Hong Leong Bank Berhad* [2013] 1 LNS 255, where it was held:

... it is trite that when the Plaintiff operates a current account with the Defendant, he has agreed to the General Terms and Conditions relating to the same.

[83] It is an unfortunate situation that the plaintiff finds himself in. Perhaps the time has now come and in fact may be long overdue that a position similar to that obtaining in the Consumer Protection (Amendment) Act 2010 which renders exclusion clauses as well as any other unfair terms contained in standard form contracts, void and unenforceable if found to be unfair, be extended to cover the banking industry with a view to ameliorating or altogether eliminating the relatively disadvantaged position that a customer of a bank might now find himself in.

[84] Although I have found the defendant's liability to have been negated, for sake of completeness, I will go on to consider whether in any event the plaintiff has proven any losses or damage suffered as a result of the breach of duty. On the available evidence, the plaintiff's claim that he had made applications for credit facilities to Alliance Bank as well as to Hong Leong Bank and these had been rejected was baseless and without sufficient proof.

[85] There was altogether insufficient evidence that the plaintiff's alleged loan application form was actually submitted to Alliance Bank and/or Hong Leong Bank for consideration, had been processed or been rejected by those institutions. No witnesses were also called by the plaintiff to substantiate these claims neither was any reason vouchsafed as to why they were not called.

[86] In respect of the plaintiff's contention that he had made 11 consecutive complaints to the defendant regarding the failure of the auto-debit system, no police report was lodged by him during that period of time nor was any complaint made to Bank Negara in respect of the defendant's failure to respond to his complaints. On the facts therefore, I find that the defendant's version that the plaintiff's first complaint to the defendant was only made in September of 2013 to be the more probable version.

[87] Further, and as will be explained more fully hereinafter, the said categorisation of the plaintiff's PF account as "account under special attention" in the CCRIS report to Bank Negara did not mean that he was blacklisted as alleged.

[88] On the grounds stated above, I therefore find that the claim of the plaintiff fails as cl. 5.13 as contained in the "RHB Personal Financing (Conventional) Terms and Conditions" had operated to negative the defendant's liability to the plaintiff. The plaintiff had therefore failed to prove its claim against the defendant.

A *Defamation*

[89] It is axiomatic that in an action for defamation, the plaintiff must prove the following:

- (a) the words are defamatory
- B** (b) the words refer to the plaintiff; and
- (c) the words were published to a third party.

[90] See *Ayob Said v. TS Sambanthanmurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321.

- C** **[91]** The words alleged to be defamatory have been set out above but for current ease of reference they are reproduced as follows (translated to English).

“Account Under Special Attention”

D	No	Date Approved	Status	Capacity	Financer	Branch	Facility	Application/ Account No	Balance Outstanding Amount	To Date
	12	13.02.2012		Personal	RHB Bank	14129	Personal Loan Financing	714129007 5426		30.04. 2014

- E** **[92]** Of importance to note here is the fact that the column under the heading “status” is left blank as well as the column under the heading “balance outstanding amount”.

- F** **[93]** The issue that now arises for consideration is whether any reasonable person or men would be likely to understand or to treat the above wordings as being defamatory or libellous of the plaintiff.

[94] The term “reasonable person or men” must in the context of this particular case be construed to refer to participating banks and other financial institutions as the CCRIS report is only available online to those bodies.

- G** **[95]** The CCRIS report dated 14 November 2014 that had categorised the plaintiff’s PF account as “account under special attention” is set out as follows:

- H** The credit report contains factual and historical data i.e. both positive and negative information about the credit standing of the borrower as reported by the participating financial institutions. The Credit Bureau does not provide any opinion on the information in the credit report and does not blacklist any borrower regardless of the repayment history. Individual participating financial institutions has its own internal policies when processing applications for financing. Lending and financing decisions by
- I** participating financial institutions depend on information obtained from various sources, including the credit report, the risk appetite and business strategy of individual participating financial institutions. As such, it is possible for one participating financial institution to approve an application

while another may not, depending on the risk appetite of each participating financial institution. CCRIS may not necessarily be the only source of information used by the participating financial institutions in assessing creditworthiness of an applicant or borrower. A

[96] The uses of the CCRIS report stated that “The credit report is one of the information sources used by participating financial institutions in assessing a credit application ...”. This clearly meant that there are other sources other than the CCRIS report from which the banking or financial institutions may refer to in order to obtain credit information on the plaintiff. B

[97] The second paragraph in summary, stated that the report contains both positive and negative information about the borrower as well as the salient fact that the information in the report does not blacklist any borrower. It was also made clear that the approval or otherwise of any potential borrower depends very much upon the “risk appetite” of the individual participating financial institutions. C

[98] This suggests that the information contained in the said CCRIS report is not conclusive when considering the financial status of a potential borrower. D

[99] Further, DW2 who was a credit evaluation officer of the defendant who had more than 15 years’ experience in evaluating applications for loans testified as follows: E

- (a) the fact that the plaintiff’s PF account was marked as an “account under special attention” does not mean that the bank officers evaluating the plaintiff’s application for a further loan facility would conclude that the plaintiff is not a creditworthy person or that he is a financial risk; F
- (b) there are numerous factors that are taken in consideration when assessing a borrower’s application for a loan which affects the applicants “application score”;
- (c) some of these factors are the applicant’s age, occupation status, sex, residential status, industry, place of work, monthly income, type of income, marital status, number of dependants, financial commitments and track record; G
- (d) the fact that the plaintiff had defaulted in repayment of his other existing loans for two months or three months during the 12 months preceding the date of his application(s) for a new loan may also be a reason for a rejection of his application(s); H
- (e) that the “debt service ratio” would also have to be considered, meaning the issue is not just whether the applicant will be able to service the new loan but also whether the applicant will have sufficient income left over to enable him to cover his daily living expenses. I

- A [100] Upon a consideration of the above, I find that considered as a whole, there was insufficient information contained in the particulars in the “account under special attention” referred to, to lead a reasonable person to conclude that the plaintiff was a person who could be described as the following:
- B (i) the plaintiff has failed in the repaying of loans to the defendant;
(ii) the plaintiff is not creditworthy;
(iii) the plaintiff has financial problems and unreliable;
- C (iv) the plaintiff is not entitled to apply for any loan;
(v) the plaintiff is dishonest because he had breached his contract with the defendant;
(vi) the plaintiff is borrower with poor credit; and
- D (vii) the plaintiff frequently fails to repay his loans.
- [101] An almost similar situation as the facts here had obtained in the case of *Dannabar Ragavan v. AmBank Berhad* [2012] 1 LNS 1199. In fact an almost similar status was displayed in the plaintiff’s “special attention account” which showed that both the “status” and the “total outstanding balance” columns had also been left blank. The court in that case held the following:
- E In this case, there are a few significant features noted in the CCRIS report which will go to show whether the commercial banks and financial institutions (to whom the CCRIS report was made) would be likely to understand it in a libellous sense. Firstly, the space under the heading ‘Status’ is left blank. Secondly, the space under the heading ‘Total Outstanding Balance (RM)’ is also left blank. If the space under the heading ‘Status’ had been inserted with a word like ‘default’ or other like meaning word and if an amount had been inserted under the heading ‘Total Outstanding Balance (RM)’, then any reasonable man reading this report would likely have understood it to mean that the plaintiff has defaulted on his loan; and consequently he is a financial risk and not credit worthy. Therefore, when the CCRIS report is read in that light, it is rather unlikely that a commercial bank or financial institution would naturally or ordinarily infer that the plaintiff is not creditworthy or is a financial risk. It is also significant to note the testimony of PW1 who said that the CCRIS reporting is not a blacklisting of an individual.
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- H [102] The court dismissed the plaintiff’s claim for defamation in the premises. Similarly here, I find that the category of participating banks or financial institutions would have very unlikely construed or inferred that the plaintiff was not creditworthy or a financial risk.
- I [103] I find that the facts in this case and that in *Dannabar Ragavan* to be similar so that the *ratio decidendi* of what was held there in respect of the element of whether the words were defamatory, is undoubtedly applicable here.

[104] In respect of the element of publication however, unlike the situation in *Dannabar Ragavan*, the CCRIS report in this case contained the following caption:

CCRIS automatically processes the credit related data received from the participating financial institutions and synthesises the information into credit reports, which is made available to the financial institutions and the borrowers **upon request**. (emphasis added)

[105] It was thus clear that such information was not available automatically but only upon request. There was no evidence however forthcoming that any bank or financial institutions had made any such requests for the CCRIS report. This being the case, I fail to see how the element of publication can be said to have been proven. In respect of the element of publication therefore, the position that obtained in *Dannabar Ragavan* can be distinguished.

[106] In addition, there was no proof that the plaintiff had actually made or submitted any application(s) for new loans to any bank or financial institution, during the time the plaintiff's PF account was tagged as "account under special attention".

[107] The plaintiff agreed that all the four CCRIS reports tendered as exh. P-8, exh. P-10, exh. P-18 and exh. P-28 respectively were reports applied for by himself and not by any third party. Therefore there was no evidence tendered in court to show that a third party bank or financial institution had in fact seen the CCRIS report of the plaintiff whilst his PF account was marked as "account under special attention". In the premises, the plaintiff has failed to prove publication to a third party.

[108] As the plaintiff has failed to prove that the words contained in the CCRIS report tagged as "account under special attention" were defamatory and that there was in fact publication to third parties, his claim for defamation must necessarily fail.

[109] Under all the circumstances of the case therefore, the plaintiff has failed to prove his claim against the defendant on a balance of probabilities for negligent breach of bankers duty of care and defamation against the defendant and his claim is therefore dismissed with costs.

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